144/57, 551, 472 (which equalled 3 acres), that share was undivided and therefore the agreement was void for uncertainty under section 30 of the Contracts (Malay States) Ordinance and

(2) The defendant himself admitted it was a loan and this admission was supported by the oral evidence of the plaintiff's 2nd witness.

The plaintiff appeals.

I agree with Inche Hashim, counsel for the appellant that the learned Judge's decision cannot be upheld.

First, the agreement relates to a specified piece of land and gives a description of it. The only thing is that it does not specify which particular acre forms the subject matter of the transaction, but I do not think that this matters, because it is perfectly lawful and commonplace to buy and sell undivided shares in land. In any event this point was never pleaded by the defendant who was represented.

Secondly, the terms of an agreement having been proved by its production, normally no oral evidence such as that given by the plaintiff's second witness may be admitted to vary or contradict them except where fraud is alleged, as here. That the learned Judge found as a fact that the transaction was a loan shows that in his view fraud on the plaintiff's part the burden of proving which lies on the defendant, has been proved; but remembering the degree of proof that is required to establish fraud it is clear that no court can reasonably hold on the evidence so far disclosed in this case that fraud has been established.

The only question remaining is what order should be made in this appeal.

Should it be held that the transaction was a sale and specific performance ordered of P.1? Such a conclusion would be tantamount to a finding that no fraud has been practised by the plaintiff on Tengku Nong.

Che Maidin submits that owing to the course taken by the learned Judge after the conclusion of the plaintiff's case, when the learned Judge proceeded to give judgment without asking if the defendant wished to give or call evidence, the defendant was deprived of the opportunity of proving fraud by the plaintiff. It is true that if it is held that the transaction was a sale and specific performance ordered of P.1. it would be unfair to the defendant because if allowed an opportunity of giving or calling evidence he might well prove fraud in which event he would have to part only with $1,000, and not with the acre sold.

Considering this case as a whole I think that the most satisfactory course is to order a retrial before another Judge.

Costs to abide the event.

Barakbah C.J. and Azmi J. concurred.

Retrial ordered.

HO CHOON CHEE v. LEONG YEE SIN

[O.C.J. (Gill J.) December 3, 1963]

[K.L. — Civil Suit No. 680 of 1963]

Landlord and Tenant—Recovery of excess rent paid —Defendant pleading that payment made under illegal contract—Two different standard rents—Maximum recoverable rent—Meaning of—Control of Rent Ordinance 1956, ss. 3, 6 & 15(b).

The plaintiff became the sub-tenant of the defendant's husband, T. C., by an agreement dated March 1, 1946 at $150.00 per month. He went into occupation and practised as an unregistered dentist. On August 1, 1951, he became the sub-tenant of the defendant and by that time he was already a registered dentist. From February 1, 1958, he paid the defendant rent at $160 per month. In July 1961 he applied for apportionment to the Rent Assessment Board which by their order dated October 21, 1961 fixed his rent at $61.47. The plaintiff brought an action to recover excess rent paid from July 1, 1956 to August 31, 1961.

The defendant contended: (1) the plaintiff obtained the sub-tenancy to practise unlawfully as an unregistered dentist and that no money paid under an illegal contract could be recovered; (2) the rent included hire of dental equipment and payment of goodwill as the shop front was previously occupied by the defendant's father who was a registered dentist; (3) there may be two standard rents for the same premises, one for the whole of the premises first let after the relevant date under the Ordinance and the other the rent first paid in respect of a part of the premises after such relevant date.

Held: (1) the agreement was irrelevant, the defendant not being a party to it. As the plaintiff was claiming for arrears paid after he became a registered dentist it cannot be argued that he was using the premises for an unlawful purposes;

(2) parties cannot contract out of the Ordinance and any agreement as regards payment of rent on a contractual tenancy in respect of controlled premises must be subject to its provisions;

(3) as the order of the Rent Assessment Board takes effect from the date it was made the maximum recoverable rent in respect of the sub-tenancy prior to the date of the order has to be worked out under the formula laid down in section 15(b) of the Ordinance.

Cases referred to:—

(1) *Alexander* v. *Rayson* [1936] 1 K.B. 169, 182.

(2) *Tan Ah Seah* v. *Teo Kai Min & Ors.* [1954] M.L.J. 50.

(3) *Hin Seng & Co.* v. *Seac Co.* [1963] M.L.J. 109.

(4) *Chong Fong Kooi* v. *Kong Gim Hem* [1959] M.L.J. 243, 244.

(5) *Ahmad & Sons* v. *Kaliappan* [1956] M.L.J. 1.

ACTION.

T. C. Tang for the plaintiff.

A. L. Hills (Miss *K. Y. Chan* with him) for the defendant.

Cur. Adv. Vult.

Gill J.: This is an action by the plaintiff, as sub-tenant of the major portion of the ground

floor of the premises known as No. 199 (formerly No. 213), High Street, Kuala Lumpur, for the recovery from the defendant, as tenant of the whole of the premises, a sum of $5,918.86 which, he alleges, he paid during the period 1st July, 1956 to the 31st August, 1961 in excess of the rent which may lawfully be received in respect of his sub-tenancy under the provisions of the Control of Rent Ordinance, 1956.

The facts of the case are not very much in dispute. The plaintiff first obtained his sub-tenancy from one Tham Chee, who is the husband of the defendant, on 1st March, 1946 under a written agreement of the same date which described the parties as lessor and lessee respectively. The previous tenant of the premises was the father of the defendant named Leong Keng Choy who, prior to his death in 1946, was carrying on business at the premises as a registered dentist. The plaintiff went into occupation of his portion of the ground floor and started to practise there as a unregistered dentist. The rent for the portion of the premises sub-let to him was $150 a month which he paid regularly to Tham Chee. There were furniture and dental instruments in the premises of which he obtained a loan from Tham Chee. These furniture and fittings were returned to Tham Chee before 1960.

As from 1st August, 1951 the plaintiff began to pay his monthly rent to the defendant, and thus became her sub-tenant as from that date. By then he had passed an examination set by the Dental Board constituted under the Registration of Dentists Ordinance 1948, and obtained registration as a dentist under that Ordinance. As from 1st February, 1958 he paid the defendant rent at the rate of $160 a month. In April, 1961 the defendant asked the plaintiff to pay an increased rent, but the plaintiff refused to agree to any increase in rent. In July 1961 he commenced proceedings in the Rent Assessment Board, Kuala Lumpur, to have his rent fixed under the Control of Rent Ordinance, 1956. The Rent Assessment Board, on this application for the apportioning of the rent, fixed the rent of the ground floor portion occupied by him at $61.47 a month by their order dated the 21st of October, 1961.

The defendant, in answer to the claim, relies almost entirely on her amended statement of defence. Her counsel elected not to call any evidence, but he interposed in the midst of his final address to the court to ask for leave to call her to give evidence as to when she became the tenant of the premises. In the interests of justice I granted this application. Her evidence is that she became the tenant of the premises in March 1946 and that her husband Tham Chee made the agreement with the plaintiff at her request and signed the rent receipts on her instructions. She produced a bundle of receipts (Exhibit D.8),, the first of which is dated 9th October, 1947. Under cross-examination she admitted that she became the tenant from September 1947 and that prior to that date she was not the tenant. A bundle of receipts (Exhibit P.10), in which some of the receipts are for the year 1951, was put to her. All these receipts, she agreed, were signed by Tham Chee, except four which she signed in Tham Chee's name for him. When a receipt dated 9th August, 1951 (Exhibit P.5) was put to her, she said she could not remember whether this was the first receipt which she signed. In answer to a question put to her by the court, she said that she did not know what rent she was paying the landlord in July 1956. However, a receipt dated 6th May, 1954 in D.S. shows that she was then paying a rent of $100 a month for the whole of the premises.

It is contended on behalf of the defendant that the plaintiff obtained his sub-tenancy in order that he might practise at the premises as an unregistered dentist contrary to section 8 of the Registration of Dentists Ordinance, 1946, so that the tenancy agreement of 1st March, 1946 was unlawful and that therefore no money paid under that illegal contract can be recovered. A short answer to that is that the plaintiff is not seeking to recover any money paid to Tham Chee under that tenancy agreement. The defendant was not a party to this agreement and she has admitted that she was not the tenant of the premises at the time of the agreement. There is nothing in the agreement to suggest that Tham Chee executed the agreement as agent for the defendant, nor is there any evidence to show that it was made known to the plaintiff at the time of the agreement that Tham Chee was signing the agreement on behalf of the defendant. I agree that where the purpose of a contract is illegal or unlawful, neither party can sue upon it (see *Alexander* v. *Rayson* [1]), but to my mind the agreement relied upon by the defendant is wholly irrelevant to the issues in this case. It is to be observed that the plaintiff's claim is in respect of the period 1st July 1956 to 31st August, 1961, during which period he was a registered dentist, so that it cannot be argued that he was using the premises for an unlawful purpose. This part of the defence must therefore fail.

The next contention of counsel for the defendant is that the sum of $150 paid by the plaintiff included hire of dental equipment and payment of goodwill of the shop front which was previously occupied by the defendant's father as a registered dentist. All these payments, he argues, were made under the agreement of 1st March, 1946, which cannot be abrogated by the Control of Rent Ordinance, 1956. It is common ground that the premises are subject to rent control legislation. It has been said again and again that the parties cannot contract out of the

rent control legislation. Any agreement as regards payment of rent on a contractual tenancy in respect of rent controlled premises must therefore be subject to and governed by such legislation. In any event, as I have already stated, the tenancy agreement in question is not material to the issues in this case. This contention on behalf of the defendant therefore must also fail.

Coming to the question of the rent which may lawfully be received under the provisions of the Control of Rent Ordinance, 1956, counsel for the defendant argues that there may be two standard rents for the same premises, one for the whole of the premises first let after the relevant date under the ordinance, and the other the rent first paid in respect of a part of the premises after such relevant date. What he says in effect amounts to this, that the rent of $150 which the plaintiff paid from the date of commencement of his sub-tenancy is the standard rent in respect of the part of the premises covered by the sub-tenancy and that this standard rent could be lawfully received until the rent of the whole premises was apportioned and the rent of his part of the premises determined by the board. In support of this proposition he relies on the judgment of Spencer Wilkinson J. in *Tan Ah Seah* v. *Teo Kai Min & Ors.*[2] and the judgment of Ambrose J. in *Hin Seng & Co.* v. *Seac Co.*[3]. In my opinion neither of those two cases is applicable to the present case, because the law has changed since the first of those cases was decided, and as regards the second case the law in Singapore is not quite the same as under our 1956 ordinance. In particular there was no provision under our old law, and there is no provision under the Singapore law, similar to that contained in section 15 of the Control of Rent Ordinance, 1956, which materially affects the previously existing positions as between tenants and sub-tenants. It is also to be observed that section 3(1) of our new Ordinance uses the words "in excess of the maximum recoverable rent....as determined in accordance with the provisions of this Ordinance" as opposed to the words "in excess of the rent fixed by an order of the Board, or, if no order has been made, in excess of the standard rent" used in our old ordinance and the present Singapore ordinance.

The plaintiff's claim in this case, as I have stated above, is for rent paid in excess from 1st July, 1956, which is the date on which the Control of Rent Ordinance, 1956 came into force. Under section 3 of this ordinance the rent which may be "lawfully received" is "the maximum recoverable rent" as determined in accordance with the provisions of the ordinance. Sub-section (4) of this section provides that where a tenant has paid his landlord a sum in excess of the rent which may be lawfully received he may recover such sum from the landlord. As the words "tenant" and "landlord" are defined in the ordinance to mean "sub-tenant" and "tenant" respectively in the case of a sub-tenancy, it follows that sub-section (4) also empowers a sub-tenant to recover from the tenant any rent paid in excess of the maximum recoverable rent in respect of the sub-tenancy.

Section 6 of the ordinance provides that as between a landlord as such and his tenant the maximum recoverable rent shall be either the rent fixed by order of the Rent Assessment Board, or, where there has been no order of the board, the standard rent together with certain permitted increases set out in sub-section (1)(b). Sub-section (3) provides that this section shall not apply to any tenancy arising from the sub-letting of part of any premises. Thus, "standard rent" is important only insofar as it helps to determine the rent payable by the tenant to his landlord for the whole of the premises, where there is no order by the board fixing such rent.

Where there has been a sub-letting, the position is governed by section 15 of the ordinance, which reads as follows:—

> "Where a tenant has sub-let any part of the premises whether before or after the coming into force of this Ordinance, the maximum recoverable rent of such part shall be —
>
> (a) such amount as may have been determined by the Board under sub-section (4) of section 8 or section 16 of this Ordinance; or
>
> (b) where there has been no such determination by the Board, such amount, increased by ten per centum, as bears the same proportion to the maximum recoverable rent of the whole premises as the area of the part so sub-let bears to the area of the whole premises."

The position is thus crystal clear as regards the ascertainment of the maximum recoverable rent in respect of a sub-tenancy. In *Chong Fong Kooi* v. *Kong Gim Hem,*[4] a decision of the Court of Appeal, Thomson C.J. (as he then was), stated as follows:

> "Section 15 says that where there has been a sub-letting of premises the maximum recoverable rent of the portion sub-let may either be an amount determined by the Rent Board under section 8 or section 16 or, where there has been no such determination, then it is an amount arrived at in accordance with a formula laid down by section 15(b)."

In the present case the board made an order of apportionment of the rent of the whole premises as between the tenant and the sub-tenant, thereby fixing the maximum recoverable rent from the sub-tenant at $61.47. This order quite clearly takes effect from the date on which it was made, because it has been held that a Rent Assessment Board has no power to make any order retrospectively (see *Ahmad & Sons* v. *Kaliappan* [5] and *Chong Fong Kooi* v. *Kong Gim Hem, supra*). Quite clearly, therefore, in so far as the plaintiff's claim is concerned, section 15(a) cannot be applied to any rents paid in excess of the maximum recoverable rent prior to the date

of the order by the board. In the circumstances these excess payments have to be worked out under the formula laid down in section 15(b).

For the purpose of ascertaining the excess amount under the formula laid down by section 15(b), all that is necessary to know is the maximum recoverable rent of the whole premises and the proportion which the area of the part sub-let to the plaintiff bears to the area of the whole premises. No evidence was led as to these matters, but there is ample information about them in the notes of proceedings before the Rent Assessment Board. These notes of proceedings were included in the agreed bundle of documents which was put in by consent of the parties and marked as exhibit P.1. The relevant portion from P.1 was read out by counsel for the plaintiff in his opening speech and was referred to again in his final speech. It has been contended by counsel for the defendant that these notes of proceedings cannot be said to be in evidence. I do not agree. In the first place, counsel for the defence did not object to the bundle being marked as an exhibit, and in the second place, the relevant portion was actually read at the trial. They must therefore be taken to be in evidence.

As stated in the notes of proceedings, the parties agreed before the board that the maximum recoverable rent for the whole premises was $167.65 and that the rent for the whole of the ground floor was half the rent for the whole premises, namely, $83.83. The maximum recoverable rent for the whole of the ground floor therefore was $83.83 increased by ten per centum, making a total of $92.21. It was also agreed that the plaintiff occupied two-thirds of the ground floor area, so that the maximum rent payable by him works out at $61.47 (being two-thirds of $92.21). The receipts produced at the trial show that the standard rent for the whole of the premises up to 1954 was $100 *per mensem*. To that sum must have been added certain increases permitted under section 6 of the ordinance so as to make the maximum recoverable rent in 1961 as $167.65. There can be no doubt that the maximum recoverable rent in July 1956 could not be any higher.

Once the maximum recoverable rent in July 1956 is ascertained by the formula laid down in section 15(b) of the ordinance, the rest is a matter of simple arithmetical calculation. It is not denied that the plaintiff paid $150 a month from 1st July, 1956 to 31st January, 1958. He thus paid $88.53 in excess for 19 months, making a total of $1,682.07. For the period 1st February, 1958 to 31st August, 1961, a period of 43 months, the plaintiff paid an excess of $98.53 *per mensem*, making a total of $4,236.79. He thus paid a total of $5,918.86 in excess of the maximum recoverable rent during the period 1st July 1956 to 31st August, 1961. Against this sum must be set off the sum of $1,721.16, being the rent payable by the plaintiff to the defendant from 1st September, 1961 to 31st December, 1963. There will therefore be judgment for the plaintiff for a sum of $4,197.70 and costs.

Judgment for the plaintiff.

Solicitors: *T. C. Tang & Co.*; *Donaldson & Burkinshaw*.

RAJAMONEY v. PONNIAH

[F.C. (Thomson L.P., Barakbah C.J., Tan Ah Tah J.) December 5, 1963]

[Ipoh — Federal Court Civil Appeal No. 52 of 1963]

Practice and Procedure—Application for Adjournment by defendant—Adjournment given subject to payment of costs—Costs not paid—Order made precluding defendant from defending—Whether such order valid—K.S.C. 1957, O.36 r.34.

Costs—Order for—Enforcement of, by precluding defendant from defending—Whether proper.

O.36 r.34 reads: "The Judge may, if he thinks it expedient for the interests of justice, postpone or adjourn a trial for such time, and to such place and upon such terms, if any, as he shall think fit."

Under the foregoing rule an order was made by the Judge that if the defendant, who had applied for an adjournment and whose application had been granted subject to his paying costs of the adjournment, failed to pay such costs, then he would be precluded from defending.

Held: (1) anything preventing a defendant from being heard is so contrary to the principles of natural justice as to require the most clear and explicit statutory justification. O.36 r.34 is not such a statutory provision and a defendant could not be precluded from defending under it;

(2) an order for costs may be enforced in a variety of ways. If it is to be enforced by precluding the defendant from defending, there must be express statutory provision to that effect. As no such statutory provision was referred to the Court the order of the Judge should be set aside.

FEDERAL COURT.

S. A. Lingam for the appellant.

P. P. Dharmananda (*N. H. Chan* with him) for the respondent.

Thomson, Lord President (delivering oral judgment): This is an appeal against a decision of Mr. Justice Ali Hassan.

There would seem to be a long and confused history of litigation between the parties which it is not necessary to examine here.

The course followed by the present proceedings was as follows.

On 26th July, 1962, the plaintiff in the High Court proceedings (who is the respondent to this appeal) issued a writ asking for a variety of reliefs in connection with certain premises. On 5th September the defendant, who was then legally represented, filed a defence. There would seem to have been a series of delays and ultimately the matter came on for hearing on 25th